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Brief of Blair for Appellee

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. [redacted]. 280

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VA., APPELLANT,

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of F. S. Blair, Counsel for Appellee.

S. A. ST. CLAIR PRESS, WYTHEVILLE, VA.

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vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of F. S. Blair, Counsel for Appellee.

Statement of Facts.

This is an Appeal, by Harkrader Sheriff of Wythe County, Virginia, from an order of Hon. Charles H. Simonton, Judge of the Circuit Court of the United States for the Fourth Circuit, discharging H. G. Wadley, on a writ of Habeas Corpus, from the custody of said sheriff who held him a prisoner on an order of commitment of the County Court of Wythe County, Virginia.

On the 11th August, 1896, the said Wadley presented to Hon. Charles H. Simonton, *as Circuit Judge*, in vacation, a petition for a Writ of Habeas Corpus. This petition, duly verified, represented that said Wadley was unlawfully imprisoned in the County jail of Wythe County, Virginia, in the custody of said Harkrader, by virtue of an order of Commitment of the said County Court of Wythe County, Virginia, at Wytheville, made on the 10th August, 1896. The petition with its exhibits further represented that certain creditors of the Wytheville Insurance and Banking Company, had, in October,

1893, brought, in the Circuit Court of the United States for the Western District of Virginia at Abingdon, two equity Suits under the style of Paul Hutchinson *vs.* The Wytheville Insurance and Banking Company, and Blount & Boynton et al *vs.* H. G. Wadley et al, in which suits a Receiver was appointed who took charge of all of the assets of said Company, and in which there was a restraining order, and that a Master Commissioner of said Federal Court had been appointed to take all necessary accounts of the indebtedness of said Company, and of said Wadley's liability to said Company upon a charge made in the bills of a misappropriation and conversion of the assets of the Company by said Wadley, who was its President, and of a consequent claim of liability by Wadley to said creditors of said Company; that said Master had proceeded with his accounts, and had, in the progress of the account, taken the deposition of Wadley himself, and had said deposition, and the books and records of said Company under his control as such Master of the Federal Court in said equity suits. The petition further represented that on the 16th April, 1894, while said suits were still progressing, and while said Federal Court had *a prior and exclusive jurisdiction* of the persons of said creditors, and of said Wadley and of the subject-matter of the controversy between them as to the assets of said Company, and of said records of said Company, the *same* creditors, who had first invoked and were then enjoying the prior jurisdiction of said Federal Court by the Equity Suits brought therein by themselves against said Company and Wadley, had caused themselves and their counsel in said suits, to be summoned, as witnesses, before the Grand Jury of said County Court of Wythe County, Virginia, and had illegally procured an indictment to be made against said

Wadley for the embezzlement of the very same assets that were under the control and jurisdiction of said Federal Court and being adjudicated by it, and that said indictment was procured by the *misuse* and *abuse* of certain records of said Federal Court in said equity suits, including the deposition of said Wadley taken therein, which were taken from the files of said suits in said Court without the knowledge or leave of said Court and used and read by said creditors or counsel before said Grand Jury, and, in this way had procured said indictment.

The petition for Habeas Corpus further represented that said creditors had put said indictment on foot against said Wadley for the purpose of *terrifying him into the payment to them of the debts* claimed by them from the Company in said Equity Suits, and the petition and exhibits showed that upon these three grounds, among others, viz:

First.

Because the creditors who originated and were conducting the prosecution against Wadley, as well as the subject-matter thereof, and Wadley himself, were all under the prior jurisdiction of the Federal Court.

Second.

Because of the said misuse and abuse of the said Federal records and deposition of Wadley by said creditors for the purpose named.

Third.

Because the prosecution was put on foot and was being conducted as an illegal means of coercing Wadley to pay them the debts due them from said Company.

That said Federal Court, on 8th June, 1894, awarded said Wadley an injunction, against said creditors, enjoining them from all further prosecution of said indictment, and enjoining the use of said Federal records for the purposes of said prosecution *until the further order of said Federal Court.* The petition for Habeas Corpus and exhibits showed that this injunction was duly perfected, and that, afterwards on 31st January, 1895, it came on to be heard before said Federal Court, upon bill and exhibits, answers and exhibits, replications, demurrers and joinder, depositions taken before a Master of said court appointed for the purpose, and upon motion, after notice, for a dissolution of said injunction and that, upon a full hearing of said cause *on its merits*, the Federal Court sustained the bill, overruled the motion to dissolve said injunction, and continued it in full force, and that said decree of 31st January, 1895, has never been appealed from and remains in full force and effect. The Hon. Nathan Goff who rendered said decision of the Federal Court, on the 31st January, 1895, filed an elaborate written opinion in the case which was exhibited with the petition for the Habeas Corpus, and is reported 65 Fed. Rep. p. 667, and which opinion gives the grounds of said decision with a full citation of law sustaining it. In short, the injunction had been awarded under § 716 R. S. U. S. which gives to Federal Courts the power to issue all writs necessary to the exercise of their respective jurisdictions.

The petition for Habeas Corpus and exhibits further show that, notwithstanding said prior jurisdiction by the Federal Court of the persons of said creditors, of said Wadley, and of the subject-matter of said prosecution and notwithstanding the decree of said Federal Court of 31st January, 1895, refusing to dissolve said injunction,

the said creditors persisted, *by their counsel, acting as assistant prosecutors,* in prosecuting said indictment in said State court, by demanding the committal to prison of said Wadley, and that on the 5th August, 1896, upon this breach of said injunction being again brought to the attention of said Federal Court by a petition filed in said suits in Equity, that Court, by Hon. Charles H. Simonton, issued a further restraining order prohibiting all further proceedings in said prosecution in said County Court and especially from committing said Wadley to prison under same until the further order of the court, and awarding rules for contempt against said creditors, counsel and all persons violating said orders of the Federal Court. None of these orders were appealed from, and all remain in full force and effect, that is to say:

A.

The order of Federal Court of June 8, 1894, granting the injunction by Judge Goff.

B.

The decree on the merits, of January 31, 1895, sustaining the bill and overruling the motion to dissolve the injunction by Judge Goff.

C.

And the order of August 5, 1896, enlarging restraining order by Judge Simonton.

Proceedings on Habeas Corpus.

This petition for Habeas Corpus was presented, (out of court,) to Hon. Charles H. Simonton *as Circuit Judge* of the Fourth Circuit, and on said 11th August, 1896, *he* (not tbe Clerk) issued, *as Circuit Judge* his writ of Habeas Corpus upon the petition of said Wadley, and addressed it to said Harkrader, Sheriff, making said

writ returnable "before me Charles H. Simonton, Judge," "at Greenville, South Carolina on the 14th day of August, 1896." See writ p. 5. He signed the writ "Charles H. Simonton, Judge." The Return of said Sheriff was addressed to "the Honorable Judge," &c., and he produced the body of said Wadley before said Judge at Greenville, South Carolina, on said 14th August, 1896, "in obedience to the command and direction thereof;" and on said 14th August 1896, the Hon. "Charles H. Simonton Circuit Judge," heard said writ, on the return of sheriff, traverse or denial thereof by petitioner, and petitioner's demurrers to Return, and *Judge Simonton discharged* said Wadley, because said indictment set up was "notwithstanding the injunction and writ of this Court" and "as said Court cannot prosecute said indictment pending said injunction," and ordering that "the said H. G. Wadley hold himself subject to the further order of this Court." The order of discharge of 14th August, 1896, was then addressed and sent "To I. C. Fowler, Clerk of this Court at Abingdon, Va.," and it and petition and papers were "filed" in the Circuit Court of the United States for the Western District of Virginia at Abingdon, "Fourth Circuit" on August 18, 1896. The Sheriff obeyed this order of Judge Simonton and discharged said Wadley. Thus ended the Habeas Corpus proceedings, until *October 8th, 1896*, when a petition for appeal and an assignment of errors were filed in the Clerk's office of the Circuit Court of the United States for the Western District of Virginia at Abingdon, see p. 49. *There was no allowance of appeal.* until 12th October, 1896, when "Charles H. Simonton Circuit Judge," subscribed "The prayer of this petition allowed," and upon this appeal on Habeas Corpus case is here.

On Motion to Dismiss Appeal.
The Law and Facts Applied.

This, then, is an Appeal from an order discharging a prisoner on a writ of Habeas Corpus. It was a proceeding before Hon. Charles H. Simonton, Circuit Judge for the Fourth Circuit, at his Chambers in Greenville, South Carolina, for the discharge of the prisoner from the custody of the Sheriff and jailor of Wythe County, Virginia, under an order of commitment from the County Court of Wythe County, Virginia. The petition for writ of Habeas Corpus was presented to Judge Simonton who *as Circuit Judge*, issued a writ of Habeas Corpus (found on p. 5 of transcript,) and made it returnable "before me, Charles H. Simonton, Judge of our Circuit Court of the United States within and for the said District aforesaid *at Greenville, South Carolina*, on the 14th day of August, 1896." The record p. 6, shows that the jailor made his Return to said 14th August, 1896, and that the prisoner filed his Demurrer and Denial and traverse to said Return. See pp. 10 and 11, upon consideration whereof on said 14th of August, 1896, Charles H. Simonton, *Circuit Judge*, made and signed an order discharging said prisoner from custody, and at foot of order, addressed it to "I. C. Fowler, Clerk of this Court at Abingdon, Va." meaning Clerk of the United States Court for Western District of Virginia, wherein on 18th August, 1896, the order was "filed." See p. 12.

From this order the jailor was allowed an appeal to this Court by said Circuit Judge, see p. 49, and the case was docketed here as an "Appeal from the Circuit Court of the United States for the Western District of Virginia." The form of the docket entry, however, does not change the character of the proceeding from which

the appeal was taken, and that was clearly before the *Circuit Judge, sitting as a Judge* and not as a court.

We submit that this appeal should be dismissed for the following reasons:

First.

Because no appeal lies to this Court from an order of a *Circuit Judge* of the United States, sitting as a Judge, and not as a Court, discharging a prisoner brought before him on a writ of Habeas Corpus.

Carper v. Fitzgerald 121, U. S. 87, "when the writ of Habeas Corpus is issued by a Circuit Judge, and made *returnable before him*, not before the Circuit Court, there is no appeal from his decision." Curtis "Jurisdiction of United States Courts," bottom of p. 222.

2 Foster Federal Practice, page 751.
In re Palliser, 136 U. S. at page 262.
McKinney v. James, 155 U. S. at page 687.
Lambert v. Barrett, 157 U. S. at page 697.

Second.

Because the order of the Circuit Judge was not *final*, and hence not appealable. The prisoner was discharged "pending said injunction," and the prisoner is held subject to the further order of the United States Circuit Court. See p, 12.

That such order was not appealable, because not *final*.

Carper v. Fitzgerald 121 U. S. at page 89.
Foster Federal Practice, § 368, at page 752.
McLish v. Roff, 141 U. S. at pages 661–2.

Third.

A.

Because this being an appeal under The Judiciary Act of March 3, 1891, Chap. 517, § 5, it can come here only on the "question of jurisdiction" of the Circuit Court

of the United States. In such cases the Act. provides that the question of jurisdiction *alone* shall be certified to this from the court below. There is no *certificate* of jurisdiction or certificate of any kind in this case. A certificate, from the court below, as to the distinct question of jurisdiction involved, has been decided by this Court to be indispensable to the jurisdiction of this Court.

Maynard v. Hecht, 151 U. S. at page 324.
Colvin v. Jacksonville, 157 U. S. at page 368.
Van Wagenen v. Sewell, 160 U. S. at page 369.
Chappell v. United States, 160 U. S. at pages 499, 507.
Davis v. Giessler, 162 U. S. at page 291.

B.

The First and Second Assignments of Error pp. 49, 50 do claim now that the Circuit Court of the United States had no jurisdiction over the matter involved, but neither the Return p. 6, nor any pleading or paper in the case ever raised the question of the want of jurisdiction by the United States Circuit Court of the Habeas Corpus case, and, as already stated, there is no certificate of jurisdiction by said court below.

C.

The said First and Second Assignments of Error are too general; they do not indicate any specific question of jurisdiction; and they are not such sufficient statements of the question of jurisdiction as will supply the want of a formal certificate of jurisdiction required by § 5 of said Judiciary Act. It is true that this Court, in a few cases, has modified the rule to the extent that no certificate is necessary where the record itself presents the single matter of jurisdiction, but in those cases seeming to modify the rule, it is decided that the precise question of jurisdiction must be clearly, fully and seperately stated in the record, that no mere general statement of want of

jurisdiction, no mere suggestion that the jurisdiction of the Court was in issue, will suffice, nor will the Court itself search, nor follow counsel, to find the question of jurisdiction.

Chappell v. United States, 160 U. S. at page 499.
Van Wagenen v. Sewell, 160 U. S. at page 371.

D.

But an Assignment of Error cannot *import into a cause* questions of jurisdiction which the record does not show were distinctly and clearly raised in the Court below, and rulings asked thereon so as to give jurisdiction to this Court under Judiciary Act March 3, 1891, § 5.

Ansbro v. United States, 159 U. S. at page 697.
Cornell v. Green, 163 U. S. at page 89.
The Bayonne, 159 U. S. at page 687.

Fourth.

Because the other Assignments of Error 3, 4, and 5 seek, by this Appeal in the Habeas Corpus case, to attack *collaterally* the decrees and orders of the Federal Court of June 8th, 1894, found, p. 24, of January 31st, 1892, p. 29, and of August 6th, 1896, p. 45, rendered in certain separate and independent Equity causes in which injunctions were issued and sustained, enjoining the said creditors from the proceedings named in said County Court. There were no appeals in said Equity causes, and they are final until reversed on appeal. The Assignments 3, 4 and 5, attack these decrees and orders *collaterally*, and make them the ground of error relied on therein. The Federal Court had prior and exclusive jurisdiction of the subject-matter of said prosecution, of Wadley, and of the creditors prosecuting him, and even if these decrees and orders were erroneous they were not void, and such errors cannot be reached by this Appeal in another case, viz: the Habeas Corpus case.

Just such an effort was made in the case of In re Lennon, 150, U. S. p. 393. See at p. 400, where the Court held that an appeal in Habeas Corpus *relates to the jurisdiction* of the court below in the Habeas Corpus case and to no other case.

The effort is now made, by this appeal from the order of discharge in the Habeas Corpus, to review the decrees and orders in the Equity (Injunction) case of H. G. Wadley v. Blount & Boynton, et al. It would be allowing this appeal to perform the function of an appeal in the injunction cases.

In re Lennon, 150 U. S. at p. 400. The same principle is also clearly laid down. Carey v. Houston &c. R. R., 150 U. S. at p. 171.

This is a direct appeal from the judgment of the Circuit Judge on the Habeas Corpus. No question as to the jurisdiction of the Circuit Judge, by whom this case was decided, has been certified to this Court nor was such certificate ever asked for in that court; nor was any question of the jurisdiction of that court, in this case, raised or presented, in any way, by any form of pleading.

The questions of jurisdiction presented, by the 3, 4 and 5 Assignments of Error, relate not to the question of the jurisdiction of the Circuit Court in this (Habeas Corpus) case but relate to the jurisdiction of that Court in the Equity suits of H. G. Wadley v. Blount & Boynton et al, in which writs of injunction were issued restraining the creditors from proceeding in County Court of Wythe County, Va., by said indictment. The fifth section of Judiciary Act of March 3, 1891, does not authorize a direct appeal to this Court in a suit upon a question involving the jurisdiction of the Circuit Court *over another suit previously determined* in the same court, and no

question of jurisdiction over that other suit or over the decrees passed therein, can avail to sustain the direct appeal.

Carey v. Houston R. R., 150 U. S. 170, and In re Lennon Ibid are cases in point.

Fifth.

Because the record does not show that the "Appeal" allowed was ever "filed" in the United States Circuit Court. For even though in fact it had been delivered to and lodged with the clerk, this court is without jurisdiction.

The *"filing"* of the writ of Error or Appeal, in the court below, is essential to the transfer of the jurisdiction of the case from that court to this, and until that is done, this Court is without jurisdiction to entertain the case.

Brooks v. Norris, 11 How. at page 207.
Mussina v. Cavazos, 6 Wall at page 355.
Mutual Life Co. v. Phinney, 76 Fed. at page 617.
Where cases are collated.

The petition for appeal and assignment of Errors were filed October 8th, and while allowance of appeal was October 12th, *it seems never "filed"* but merely lodged with the clerk. See page 49.

On Merits!

But if our motion to dismiss this appeal is overruled, and this Court should, at all, consider the validity of the decrees and orders in the Equity case, we beg to refer to the case itself which is reported as Wadley v. Blount et al, 65 Federal Reporter page 665, and we submit that the decrees and orders of the Federal Court are valid.

As before stated, as far back as October, 1893, the said Federal Court acquired *prior* and therefore *exclusive* jurisdiction of all the assets of the Wytheville Bank-

ing and Insurance Company, of the creditors, of Wadley, and of the issues and controversies of misappropriation and embezzlement of the assets by Wadley the President. The Court had appointed a Receiver of the assets, had issued restraining orders, had appointed its Master to take, settle and report the necessary accounts, who had the assets, who and what liable for them, and the standing of Wadley's accounts with the Company, and the Master was proceeding to do so. Pending said investigation and account the deposition of H. G. Wadley was taken before said Master, in said causes. The creditors, Blount & Boynton and others, the plaintiffs in said Equity causes, and who themselves had invoked the prior jurisdiction of said Federal Court, about April, 1894, abstracted copies of the said deposition of said Wadley and other records and papers, from said causes, without the leave or knowledge of the Court, or Commissioner, and then had their counsel summoned as witnesses before the Grand Jury of Wythe County Court, Va., and carried said deposition and records and papers of the Federal Court before said Grand Jury, and used and read them as the basis of an indictment for the embezzlement of the very same assets of the said Company which, at that very time, were being administered, investigated and adjudicated by said United States Court in the said equity suits, brought by said same creditors by said same counsel. For this violation of the prior jurisdiction of the United States Court, and for the misuse and abuse of its records, and for other reasons fully set forth in Judge Goff's opinion, p. 32 et seq. notably the attempted intimidation by said prosecution, which we will give in the words of Judge Goff, at page 38 of Transcript. "I find from the testimony in the case, that after the creditors of the Wytheville Banking and

Insurance Company had intervened and been made parties complainants in the said suit of Paul Hutchinson, adm'r &c. against that company and others, and after they had proven their claims before the master and he had formulated his report, that they in a meeting called and held for the purpose of determining the proper course for them to pursue, in the light of the case as shown by said report and Wadley's deposition, concluded to submit to him, the said Wadley an offer to adjust the debts reported by said master, (as to which it was claimed he was individually liable,) at the rate of fifty cents on the dollar, at the same time having an understanding among themselves that if he declined such proposition that they would procure his indictment in the county court of Wythe county, and prosecute him for the misappropriation of the funds of said company,—the money required to carry on such criminal procedure being arranged for at the same meeting that the offer of conference was agreed to. And also do I find that when such an offer was declined by Wadley, that they proceeded to procure his indictment, using for that purpose a copy of his deposition so given before the master of this court, and evidently procuring the summoning of their counsel as witnesses before the grand jury (some of whom declined to go before that body unless they were duly subpœnaed so to do) and having them assist in the preparation in the bill of indictment, and in the prosecution of Wadley under it. That the criminal procedure when first suggested was intended to aid the creditors in adjusting their debts with Wadley is, I think without doubt, and the fact that the effort failed is, so far as the matter now before me is concerned, immaterial. The circumstances were, it must be conceded, unusualy anomalous, such as to naturally cause excitement and indignation, yet nev-

ertheless as the evidence discloses conduct that cannot be justified and is far from being conducive to the fair administration of justice; that is in fact most reprehensible, dangerously near the border land that divides impropriety from criminality, and I truly hope that never again in this jurisdiction will an effort be made to duplicate it," that Court enjoined the creditors from proceeding in the county court, by said indictment and the several orders and decrees named were entered therein from time to time. It was also an *indirect* effort, by the use of Wadley's depositions, to compel him to testify against himself, and thus secure an indictment against him. This was a violation of § 860 R. S. U. S. that forbids the use of records of a Federal Court, in any other court, against a party thereto, and besides, was a flagrant contempt of said Federal Court by said plaintiffs and counsel. The Commonwealth Attorney of said county was made a party and was enjoined from the use, and abuse of said deposition and records of the Federal Court, in said prosecution, and from an abuse of his authority as such; for whether he was cognizant of the true facts and nature of the prosecution, or was ignorant of them, in either event, the procurement of the indictment by said creditors, in the manner explained, was an abuse of the functions of a Grand Jury, and a violation of Wadley's rights as an American citizen, and a contempt of the Federal Court, and he should not have been permitted by the Federal Court to give the aid of his office to such a prosecution, which sought to convert a Grand Jury into a Collection Agency to collect debts by terror of prosecution.

We might rely on the very able opinion of Judge Goff, filed in this record at p. 32 of transcript, and in 65 Fed. Rep. p. 675, but we supplement it by many additional authorities, which are not elaborated or cited by the

learned Judge, some of them found since his decision, but all fully sustaining him in every regard.

A.

We assert the following legal propositions:

1.

That the Federal Court of Equity, having first acquired jurisdiction of the litigation, by the Equity suits, its jurisdiction was exclusive of all other courts, and its orders and decrees, or jurisdiction could not be defeated by the institution of proceedings in any other court, at law or in Equity, Federal or State, civil or criminal.

The same creditors who had put on foot the criminal proceedings in Wythe County Court, whose counsel furnished the data, and wrote the indictment, who had themselves sent before the Grand Jury as witnesses, and who became the special prosecutors of the case, were the complainants in the equity suit then pending in the United States Court at Abingdon, and on exactly the same controverted issues.

Not content to wait for the United States Court, that first acquired jurisdiction of the parties and the issue of law and fact, to settle and adjudicate the questions put in issue there, they went to the county court, and had the defendant indicted for the same matters, and on same proofs, that were being litigated against him in the United States Court.

See the law against this course of conduct,

"A court once taking jurisdiction of a controversy is bound to continue that jurisdiction to the final determination of the *entire* controversy."

Central Trust Company v. Wabash R. R. Co., 29 Fed. Rep. 546.

"A Bill for an Injunction to prevent interference, by *criminal procedure*, will lie, when the parties sought to be enjoined, have as plaintiffs, submitted themselves to the court, by a bill in equity, as to the matter or right involved or affected by the criminal procedure.

Spink v. Francis and others, 19 Fed, Rep. p. 670, both Billings and Pardee, J. J. of the Circuit Court of the United States for Louisiana, concurring in this decision.

In Williams v. Frances et als, 20 Fed. Rep. p. 567, it was decided as follows:

"Equity Jurisdiction."

"A Court of Equity can interfere by an order, with a party conducting a *criminal procedure* when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court, by a Bill of Equity as to the matter, or right, affected by, or involved in the criminal procedure; but the pursuer and the pursued must be identical in each case i. e., the defendant in the bill and in the indictment must be the same person, and the person preferring the bill and the criminal charges must also be the same. As to parties and controversy, the inquiry is analogous to that in regard to the plea if *lis pendens*.

On p. 568 of the same case, the opinion of Lord Elden and Lord Cairnes are quoted to same effect as above. Lord Hardwicke established the rule, as shown also on p. 578 of same case.

But the Circuit Courts of the United States are fully supported on this point.

In Re Sawyers, 124 U. S. R., p. 211, Mr. Justice Gray said:

"Modern decisions in England, by eminent equity judges, concur in holding that a Court in Chancery has

no power to restrain *criminal* proceedings, *unless they are instituted by a party to a suit already pending, before it, and to try the same right that is in issue there.*

This is the *precise point* in this case. Mr. Wadley was pursued in equity in the United States Court by these creditors and was sought to be held civilly liable for actual fraud, and the unlawful conversion of the assets of the company, and he was indicted *on exactly the same facts and issues* by these same creditors. In Re Sawyers ante, p. 122, Mr. Justice Field said:

"In many case proceedings, criminal in their character, taken by organized bodies of men, or individuals, tending, if carried out, *to despoil one of his property or other rights, may be enjoined by a Court of Equity.*

Mr. Justice Story, in his Equity Jurisprudence, vol. 2. § 893, p. 223, thus clearly puts the rule:

"There are, however, cases in which Courts of Equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition *But this restriction applies only to cases, where the parties, seeking redress by such proceedings, are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally at the same time from proceeding, upon the same matter of right, for redress in the form of a civil suit, and of a criminal prosecution.* In such cases, the injunction is merely incidental to the ordinary powers of the court to impose terms upon persons, who seek aid in furtherance of their rights."

In Robert's Principles of Equity, it is said:

"Equity will restrain proceedings in any criminal, or other matter, which is not strictly of a civil nature, *where*

the persons prosecuting the same are also, at the same time proceeding, as plaintiffs, in equity in regard to the the same matter."

"Equity Practice" (State and Federal) by Beach, at § 761, vol. 2, thus lays down the present modern rule to be:

"It is a rule of almost universal application, both in England and in this country, that a Court of Equity has no jurisdiction of injunction, to restrain a criminal proceeding, whether it be by indictment or summary process, *unless* the *criminal proceedings* be brought by a party to a suit already pending in the Equity Court, and to try the same rights that are in issue there."

But the right of a Court of Equity to award an injunction to restrain complainants in a suit in that court from prosecuting a *criminal proceeding* against the defendant even though such criminal case be instituted in another court was established as far back as the days of Lord Hardwicke, for we find he did that very thing himself in the case of The Mayor and corporation of York v. Pilkington, reported 2 Atkins, 302. In that case certain plaintiffs in a chancery bill and cross bill to establish in equity their sole right of fishing in a certain stream, while their chancery bill and cross bill were still pending in equity, caused the defendant to be indicted at the York Criminal Court for a breach of the peace for such fishing, and Lord Hardwicke awarded an injunction, against the plaintiffs in equity and restrained them from all further criminal proceedings in other courts, and stopped all proceedings on the indictment until the final hearing of the other cause in equity was had. He said where parties had submitted their rights to a Court of Equity, it certainly

had a jurisdiction, and might interpose to stop proceedings on indictment.

> Leading Cases in Equity, vol. 2, part 2, American notes, top page 95, marginal 67.

In the same case, Lord Hardwicke said that if a plaintiff filed a bill in equity, in a court against a defendant, for a right to land and a right to quiet the possession thereof, and after that, he had preferred an indictment against such defendant for a forcible entry into said land, the Court of Equity would certainly stop the indictment by an injunction. See supra.

The principle involved, in allowing the injunction, is the principle, pure and simple, that the court that *first acquires jurisdiction* of parties and the subject-matter, has full and complete cognizance over such parties, and such subject-matter, for all purposes, and can and will restrain and enjoin any inequitable conduct on their part, as the conditions and terms of enjoying such prior jurisdiction.

The then state of affairs, if not prevented by injunction, might have presented the anomaly of Mr. Wadley, being adjudged on the law and facts of his defence, in the Federal Court, *as not liable civilly, for said assets*, and yet by a private prosecution, in said County Court of Wythe, by an indictment for the embezzlement of said assets, he might have been convicted, on the same evidence, upon which a Federal Court had held him, civilly, not liable therefor. It is not believed that a court will allow any possibility of such anomaly but will vindicate its prior jurisdiction. It would have been ample time for these creditors to prosecute Mr. Wadley when the Federal Court that had full, complete, and prior jurisdiction of the parties and the subject of controversy, by its decree, had

adjudicated him to be civilly liable. The creditors were converting a Grand Jury into a "collection agency" to enforce their claims, pending before, but not yet adjudicated, by the Federal Court.

2.

That Jurisdiction Exclusive, which first Attaches.

JURISDICTION ACTUALLY ACQUIRED.—Of two courts having concurrent jurisdiction of any matter, the one whose jurisdiction first attaches acquires EXCLUSIVE CONTROL of all controversies respecting it involving substantially the same interests.

Bruce v. Manchester & K. R. R., 19 Fed. Rep., at page 342.

When a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it, HOLDS IT TO THE EXCLUSION of the other until its duty is fully performed, and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and *criminal cases.* In Re James, 18 Fed. Rep., 853.

In the case of Taylor v. Taintor, 16 Wall. 367, the Supreme Court of the United says:

"When a State court and a court of the United States may each take jurisdiction (as in this case) the tribunal which first gets it, holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; *and this rule applies alike in both civil and criminal cases.* It is indeed a principle of universal jurisprudence that, when jurisdiction has attached to a person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

3.

Federal Interference with State Courts by Injunctions Proper.

U. S. Rev. Stat. § 720, prohibiting injunctions by any court of the United States to stay proceedings in a State court, *does not apply* where the Federal Court has first obtained jurisdiction of the subject-matter of the proceedings and of the parties in the State court. This section must be construed in connection with U. S. Rev. Stat. § 716, which provides that the Federal Courts shall have power to issue *all* writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Sharon v. Terry, 36 Fed. Rep., at page 337. Opinion by Mr. Justice Field.

It is said in 12th Am. and Eng. Ency. of Law p. 292, "This rule would seem to be vital to the harmonious movements of courts whose powers may be exerted within the same sphere and over the same subjects and persons. The only course of safety is where one court, having jurisdiction over the subject, has possession of the case for all others, with merely co-ordinate powers, to abstain from any interference. Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results."

Brooks v. Deplaine, 1 Mary, Ch.Dec. 351, 354.

4.

In case of Conflict of Authority; Relation of State to Federal Court.

Exclusiveness of jurisdiction first acquired.

Where a court of competent jurisdiction acquires possession of the subject-matter of controversy, and the right of the party to prosecute his action first attaches,

the right of the court to retain the case. and of the party to prosecute it, can NOT be DEFEATED by the institution of proceedings in ANOTHER COURT, although of co-ordinate jurisdiction. Authorities cited in

Saylor v. Simpson, (Ohio) 10 West. 453, 12 N. East., 181.

Prior Jurisdiction of the Controversy in Federal Court.

This case is one for the application of the rule that the court, Federal or State, which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the investigation *to the exclusion of all interferences* by other courts of co-ordinate jurisdiction.

Williams v. Benedict, 8 How., 111.
Taylor v. Carryl, 20 How., 583.
Hagan v. Lucas, 10 Peters, 400.
Buck v. Colbath, 3 Wall., 334.
Heidritter v. Eliz; Oil Cloth Co., 112 U. S. R., 294.
Union Trust Co. v. Rockford Co., 6 Bissell, 197.
Segwick v. Minch, 6 Blatchford, 156.
Judd v. Banker's and Mer. Tel. Co., 31 Fed. Rep. 183.

The 1894 edition of "Extraordinary Relief" by Spelling, says that while the State courts do not recognize the right of a Court of Equity to enjoin a criminal prosecution, yet a different rule seems to prevail in Federal courts, i. e., they can enjoin criminal prosecutions where the Federal Court has already acquired jurisdiction of the parties and subject-matter. See Spelling, p. 87 § 71, note. He cites and approves:

19 Fed. Rep. p. 670.
20 Fed. Rep. p. 567.

5.

Common Practice—Injunctions to stay Suits in State Courts.

Where the United States Court acquires jurisdiction of a case by removal *or otherwise*, and afterwards parties

institute proceedings in State courts that will, if successful, *defeat* the jurisdiction of the United States Court or *deprive plaintiffs therein of all benefit of any decree or judgment rendered in their favor*, the United States Courts may, by injunctions, lay hands on the parties and control their proceedings, although proceedings in a State court may be thus indirectly stayed or ended.

See cases of Missouri K. & T. R. R. Co. v. Scott et als, 13 Fed. Rep., p. 793, where it is said:

"That their said proceedings in said cause in said county court will annoy, harass and damage complainant compelling it to litigate in two different jurisdictions, and, by causing delays, deprive complainant of certain rights and remedies it has against the International Improvement R. W. Co., under certain contracts made with the company. Further, that there is now pending in this court a suit brought by defendant Scott against complainant for title to the lands in controversy and for damages, and involving the same issues as the case sought to be removed from the county court of Tarrant County.

Complainant asks for an injunction in the premises to restrain all the defendants, Scott, the party to the suit, Furman and Hogsett, attorneys, and Swayne, *Clerk of the county court*, from taking any further proceedings in said county court, or filing or issuing any further papers, writs, precepts, or litigating or forcing, or compelling any litigation, or taking any further action of *any kind or nature* in said county or any other court in the State of Texas."

"In so holding it is not intended to decide, that in proper cases, where the United States Court is first seized of jurisdiction, and parties are instituting thereafter such proceedings in state or other courts as will if successful,

defeat the jurisdiction of the United States Court or deprive plaintiff therein of any decree or judgment rendered in his favor, the United States cannot by injunction lay hands on parties, and control their proceedings, although hereby proceedings in a State court may be indirectly stayed or ended."

The case of Small v. Brown reported in 10th Ch. App. Law Rep. p. 64, contains a full discussion of the power of courts of equity that first obtain jurisdiction of controversy by injunction to restrain indictments.

In the Jurist, vol. 15, part 1, will be found the case of Turner v. Turner, where the power of a Court of Equity to enjoin indictments is discussed. An indictment was restroined because the same issues were sought to be litigated in different courts.

Section 720 Revised Statutes of the United States, p. 137, passed March 2, 1793, does provide, in general terms, that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such proceedings may be authorized by any law relating to bankruptcy."

To a casual reader, this would *seem* to prohibit an injunction in the case at bar, but this section 720 has been construed by the Federal Courts not to apply to cases like ours.

It has been decided that the above section 720 is to be construed with section 716 which is as follows:

"The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statue, which may be necessary for

the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

For the decisions that § § 716 and 720 must be construed together. See

Gould and Tucker's Notes, p. 191, and Fisk v. Union Pacific R. R. Co., 10 Blatchford, p. 518.

It has been decided that this prohibition in § 720 does not apply where the jurisdiction of a Federal Court has *first* attached.

Fisk v. Union Pacific R. R. Co., 10 Blatchford, p. 518.
Wagner v. Drake, 31 Fed Rep., p. 851.
Sharon v. Terry, 36 Fed. Rep., p. 838.
French v. Hay, 22 Wall, p. 253.
Dietzsch v. Huidekouper, 103 U. S. R., p. 494.
Gould and Tucker's Notes, p. 192.

And it has, under this section 720, been decided that: "A Circuit Court of the United States may issue an injunction restraining a person from commencing a suit civil or criminal, in a State court.

Live Stock Association v. Cresent City, 1 Abb. U. S., p. 338.
State Lottery Company v. Fitzpatrick, 3 Wood, p. 255.

Restraining Proceedings in State Courts.

This section applies to the restraint of suits, which, but for the injunction, this State court would have jurisdiction over, (In Re Long Island, etc., Trans. Co., 5 Fed. Rep., 628.) and only such as are commenced in the State court *before proceedings in the Federal Court have been commenced* (Fisk v. Union Pac. R. R. Co., 10 Blatch., 518;) for, if a suit be commenced in the Federal Court subsequent proceedings in a State court may be restrained. Id. "Proceedings" include all steps taken in a suit from its inception to final process. United States v. Collins, 4 Blatch., 142."

"Although the circuit court has no jurisdiction over proceedings in the State court, yet this section does not prevent it from releasing a defendant from process out of a State court violating its protection, or to prevent abuse of its privileges. Bridges v. Shelton, 18 Blatch., 517; S. C. 7 Fed. Rep., 45; Hurst's case, 4 Dall., 387. So a circuit court may restrain parties from taking out a criminal process under State law, which impairs the obligation of contracts. (Lou. State Lot. Co. v. Fitzpatrick, 3 Woods, 222;) nor does this section prohibit the district court, after a transfer of the ship and freight under the "limited-liability act" from restraining the prosecution of *any suit growing out* of the disaster thereto commenced and then pending in a State court (In Re Long Island, etc., Trans. Co., 5 Fed. Rep. 627)

6.

Unconstitutional use of Mr. Wadley's Deposition.

As has been stated, Mr. Wadley's deposition was taken in the equity case before Commissioner Gray, and the same creditors, by their counsel, who were prosecuting that equity suit, without leave of the court, obtained a copy of that deposition, and, by a subpœna duces tecum, had it produced by said counsel of creditors before the Grand Jury of Wythe County, at its May term, and on it alone, (or even with other evidence, it may be) the said creditors procured the indictment of Mr Wadley for the embezzlement of the *same assets* that they set up in their said equity suit in this court. The use of that deposition was a violation

FIRST. Of the rights of the Federal court, in the misuse and abuse of one of its records. If they had desired the use of that deposition, and could have used it at all, it was

not only due to the court, but was necessary, under the law, that they should have obtained leave to use the copy, or the original. This is an inflexible rule of court, and it was violated in this case, but

SECOND. Under Article V. of the Constitution of the United States, no man can be compelled to criminate himself, or to furnish evidence for that purpose. As this cannot be done directly, so it cannot be done by indirection. His deposition or examination compelled, by civil process, or taken in any equity suit, pending in a Federal Court, cannot be used or read as evidence against him in any criminal proceedings in any other court. This would be doing, by indirection, what the Constitution prohibits from being done directly.

For the law on above, see section 860, Revised Statutes of the United States, act passed February 25, 1868, This act, as its preamble recites, was passed to *protect the citizen in making disclosures, as parties to suits*, or in *testifying as witnesses*.

In United States v. McCarthy, 18 Federal Reporter, p. 89, in an exposition of the Fifth Amendment of the Constitution of the United States, and of section 860 of said Rev. Stat. of the United States, it was decided that "no person shall be compelled, in *any* criminal case, to be a witness against himself," and, citing People v. Kelly, 24 N. Y., 74, that if a man be prosecuted criminally touching the matter about which he has testified on the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial," Brown, United States Judge, at bottom p. 89, says, "It is unnecessary to add anything to this exposition of the law. Section 860, of Rev. Stat., will be *a complete protection, against the use of any testi-*

mony which the witness may now give, in any other transaction or proceeding against him or his property."

The Supreme Court of Virginia, in the case of Kirby v. Commonwealth, 77th Va. Rep., p. 690, says through Lewis, President: "In a criminal prosecution other than for perjury or an action on a penal statute, *evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.* The testimny was therefore, improperly admitted, *and for this error* the judgment must be reversed, and a new trial ordered."

In 1st Bishop Crim. Procedure, (2nd Edition) sections 865, 867 and note to secton 867, it is held that only legal evidence can go to a Grand Jury.

See Justice Field's opinion in note.

To show the extent to which Federal Courts carry this protection,—Sawyer J. after commenting on the 11th Amendment, In Re Pacific Railway Company, 32 Fed. Rep., 241, 267, held that if the only protection to a party was that his answer should not be used against him in a criminal prosecution, it would be a protection of little avail to a party who should disclose criminal acts upon which an indictment should be found, and should, upon compulsion, indicate other sources of evidence by means of which the acts disclosed could be proved, as such acts may also constitute offences under the laws of the State against which Congress could afford no immunity, and Judge Shipman in another case cited, allowed a witness to refuse to answer a question which he claimed would criminate himself.

Surely a Federal Court would not require Mr. Wadley to testify in the equity suit, before its Master, and then allow that deposition to be used by the plaintiffs in equity, in a State Court, as the basis of a criminal indictment

against him. The Federal Courts will not allow the citzen to be so victimized, but by injunction will restrain such unconstitutional use of its records by suitors in its court. So far has this section 860 of the U. S. Rev. Stat. been carried that, in the case of Johnson v. Donaldson, 3 Fed. Rep., p. 22, an attempt was made to produce by supbœna duces tecum certain books and accounts of a party with the view of enforcing penalties and forfeitures against him, but under this section, the court held that irrespective of this statute, it would be contrary to all precedent and in violation to all common law rules, to use such evidence against an accused.

If Mr. Wadley had been carried as a witness before the Wythe County Grand Jury and these creditors had sought to make him testify against himself, he could have claimed his constitutional privilege that no man could be compelled to criminate himself, and yet these creditors, by their counsel, who put on foot the prosecution, and maintained it throughout, procured a mere copy of Mr. Wadley's deposition from papers in the hands of the Commissioner of the court, and said counsel carried the said deposition before the Grand Jury and used it in evidence against Mr. Wadley in violation of the Constitution and laws of the United States.

7.

Combination to Oppress and Intimidate.

The evidence in the case showed a combination on the part of the creditors to oppress, injure and intimidate Mr. Wadley by said criminal prosecution. There were over 100 of said creditors in pursuit of him, and *at a meeting held by them in Wytheville, on April 25, before the indictment*, they resolved to prosecute Mr. Wadley, and they agreed to contribute 2½ ₱ ct. of the amount of their

claims for this purpose, and after the indictment, they combined and confederated for the employment of counsel, the contribution of money, and otherwise for the purpose of carrying on the prosecution. These facts were abundantly proven, by the proceedings of said meeting and by circulars, urging other creditors to combine with them, and contribute to the fund for the purpose of carrying on the prosecution against Mr. Wadley, as will be seen from the quotation already made on pages 13 and 14, from Judge Goff's opinion.

B.

Habeas Corpus the Proper Remedy.

The United States Court, by its decree, final and conclusive, of 31st January, 1895, exhibited with the petition for Habeas Corpus in this case, enjoined the said creditors "from all further prosecution of said indictment;" and that Court through Judge Simonton, a United States Circuit Judge, by another order of the 5th August, 1896, prohibited any order of any kind, except a mere order of continuance being entered in said County Court; but it was disobeyed, and H. G. Wadley committed to the custody of the Sheriff or Jailor of Wythe County. Then, the question was, will the Federal Courts enforce their own orders or will they permit their orders to be contemptuously violated by mere County Courts of a State.

The Law.

In the 65th Federal Reporter, at top page 673, the Court said that it would not tolerate any such interference by the Courts of a State, with the judicial proceedings regularly before it, and exclusively within its jurisdiction.

Congress, by section 716 of Revised Statutes of the United States, has settled the question, as to the power

of that Court to protect its jurisdiction and enforce its orders. that section is this:

"The Supreme Court and the Circuit Court and District Courts shall have power to issue writs of Scire Facias. They shall also have power to issue all writs not specifically provided, for by this statute, WHICH MAY BE, NECESSARY FOR THE EXERCISE OF THEIR RESPECTIVE JURISDICTIONS, AND AGREEABLE TO THE USAGES AND PRINCIPLES OF LAW:

This broad language of the power of that Court to protect the exercise of its jurisdiction, by the usages and principles of common law, among which is habeas corpus, was all the law that was needed for the issuance of the habeas corpus and for the discharge of the accused from the said County Court. The reference to the authorities under this section, will show, that this Court has resorted to mandamus, injunctions, certiorari, supersedeas, executions, and habeas corpus, often and over again, where necessary to protect its jurisdiction.

But, this Court in terms, has held that habeas corpus is the proper remedy in a case like this, where a State Court has usurped a jurisdiction that does not belong to it.

In 137th U. S. Reports, In Re Grimley, Petitioner, the the United States Circuit Court for the District of Massachusetts, discharged the Petitioner upon a habeas corpus, and on appeal by U. S., this Court through Mr. Justice Brewer said, page 150: "It cannot be doubted that the civil courts of the United States, may, in any case, inquire into the jurisdiction of another court, and if it appears that the party was not amenable to its jurisdiction, may discharge him. He says, the single enquiry is, that of jurisdiction. That, jurisdiction being

established, the habeas corpus would be denied, and the Petition remanded; but that, jurisdiction wanting, the habeas corpus would be sustained and the Petitioner discharged."

In 131st U. S., Hans Nielsen, Petitioner, upon a habeas corpus, Mr. Justice Bradley held, that: Habeas corpus was the remedy. He says: "It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken are unconstitutional, or *for any other reason*, the judgment is void, and the defendant who is imprisoned under it, should be discharged from custody on habeas corpus."

In 149th U. S., at page 76, in re Frederich, Petitioner, Mr. Justice Jackson says, that habeas corpus is the proper proceeding to impeach the validity of a judgment or sentence of another court, *in a criminal case*, where the judgment or sentence attacked is clearly void by reason of its having been rendered by the court without jurisdiction, or by reason of the court having *exceeded* its jurisdiction in the premises.

Ex parte Royal, 117th U. S. Rep., p. 241 is the same effect.

In ex parte Siebold, 100th U. S. Rep. on page 375, Mr. Justice Bradley, for the Supreme Court of the United States, held that relief on habeas corpus to a prisoner, even under conviction and sentence of another court, could be granted where there was a want of jurisdiction in such court, over the person or cause, or some other matter, rendering its proceedings void.

In re, Mayfield, 141st U. S. Rep. on page 116, Mr. Justice Brown, said: that this Court has held in a multitude of cases, that it has power to enquire, with regard to the jurisdiction of the inferior court, *either in respect*

to the subject-matter, or to the *person;* and even if such enquiry involved an examination of facts, outside of, but not inconsistent with the record. And a Petition for a Writ of Habeas Corpus was granted, because of defect in the jurisdiction of the Court, that held Petitioner.

In 65th Fed. Rep., at page 676, it is stated, as follows:

"If the United States Court has first obtained jurisdiction of the case, it can then always take such action as may be required to maintain its authority, and enforce its decree."

And on same page the, the court says, that this applies to a criminal as well as to a civil suit.

Again, it is hardly necessary to encumber this brief with any authorities to show that a habeas corpus is the proper remedy for Petitioner who has proceeded against in a State Court, in violation of his constitutional rights as a citizen of the United States. If such references are needed, they will be found collated in 2nd Foster's Fed. Practice § 366. pages 726–7.

We respectfully ask for a dismissal of the appeal or for an affirmance of the Judgment in Habeas Corpus proceeding.

F. S. BLAIR,
Counsel for Appellee,
H. G. Wadley.

WYTHEVILLE, VA.,
December 11, 1897.

No. 280. 41.

Brief of Blair for Appellee (mo

Filed April 11, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~222~~ 280

NOTICE TO DISMISS, MOTION, AND BRIEF THEREON.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT,

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of F. S. Blair, Counsel for Appellee.

P. A. ST. CLAIR PRESS, WYTHEVILLE, VA.

NOTICE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 678.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT.

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

To Hon. A. J. Montague, Attorney General of Virginia and ex-officio counsel for appellant:

Please to take notice that the appellee in the above entitled cause will on Monday, the day of , 1898, upon the coming in of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit a motion under Rule 6, to dismiss the appeal in this cause, and to affirm the judgment of the court below, and a printed copy of said motion of appellee to be then submitted to the court, and also a printed copy of the brief of argument in support of said motion, are hereto attached.

Dated Wytheville, Va., April 7th, 1898.

F. S. BLAIR,

Counsel for Appellee.

Service this day of a notice, motion and brief, of which the above and the annexed printed papers are copies, is hereby admitted.

Dated day of April, 1898.

MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 678.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT.

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

MOTION OF APPELLEE TO DISMISS APPEAL UNDER RULE 6 AND TO AFFIRM THE JUDGMENT APPEALED FROM, AND BRIEF OF ARGUMENT IN SUPPORT OF THE MOTION.

Now, H. G. Wadley, appellee in the above cause, by F. S. Blair his counsel, moves the Court to dismiss this cause and affirm the judgment appealed from, under and pursuant to the provisions of Rule 6 of this court; and in support of this motion he avers and shows reasons as follows:

1. Because no appeal lies to this court from an order of a Circuit Judge of the United States, *sitting as a Judge*, and *not as a court*, discharging the prisoner brought before him on a writ of Habeas Corpus.

2. Because the order of the Circuit Judge in this case was not *final*, and hence not appealable. The prisoner was discharged only "pending said injunction," and the prisoner is held subject to the further order of the United States Circuit Court.

3. Because this being an appeal under the Judiciary Act of March 3, 1891, chapter 517, section 5, it can come here only on the "question of jurisdiction," of the Circuit Court of the United States. In such cases the Act provides that the question of jurisdiction alone shall be certified to this from the court below. *There is no certificate of jurisdiction*, or certificate of any kind in this case. A certificate from the court below, as to the distinct question of jurisdiction involved, was indispensable to the jurisdiction of this court.

4. Because the assignment of error in this case, by this appeal in the Habeas Corpus case, is but an effort *to attack collaterally the decrees and orders of the Federal Court* of June 8th, 1894, found p. 24 of record, of Jan. 31st, 1892, p. 29, and of August 6th, 1896, p. 45, rendered *in certain separate and independent equity causes* in which injunctions were issued and sustained, and from which *no appeals have ever been taken*, and which are therefore *final* until reversed by appeal in those cases.

5. Because the record does not show that the appeal allowed in this case was ever "*filed*" in the United States Circuit Court. Even though, in fact, it was delivered to and lodged with the clerk, this court is without jurisdiction, for the "*filing*" *of the writ of error or appeal in the court below*, is essential to the transfer of the jurisdiction of the case from that court to this, and until that is done this court is without jurisdiction to entertain the appeal.

6. On the merits of the case we likewise submit that the appeal should be dismissed.

F. S. BLAIR,
Counsel for Appellee.
H. G. WADLEY.

BRIEF OF MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 678.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT.

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief for Appellee in Support of His Motion to Dismiss The Appeal in Above Cause and to Affirm the Judgment Appealed From.

On Motion to Dismiss Appeal. The Law and Facts Applied.

This, then, is an Appeal from an order discharging a prisoner on a writ of Habeas Corpus. It was a proceeding before Hon. Charles H. Simonton, Circuit Judge for the Fourth Circuit, at his Chambers in Greenville, South Carolina, for the discharge of the prisoner from the custody of the Sheriff and jailor of Wythe county, Virginia, under an order of commitment from the County Court of Wythe County, Virginia. The petition for writ of Habeas Corpus was presented to Judge Simonton who *as Circuit Judge*, issued a writ of Habeas Corpus (found on p. 5 of transcript,) and made it returnable "before me, Charles H. Simonton, Judge of our Circuit Court of the United States within and for the said District aforesaid

at Greenville, South Carolina, on the 14th day of August, 1896. The record p. 6, shows that the jailor made his Return to said 14th August, 1896, and that the prisoner filed his Demurrer and Denial and traverse to said Return. See pp. 10 and 11, upon consideration whereof on said 14th of August, 1896, Charles H. Simonton, *Circuit Judge*, made and signed an order discharging said prisoner from custody, and at foot of order, addressed it to "I. C. Fowler, Clerk of this Court at Abingdon, Va.," meaning Clerk of the United States Court for Western District of Virginia, with whom on 18th August, 1896, the order was "filed." See p. 12.

From this order the jailor was allowed an appeal to this Court by said Circuit Judge, see p. 49, and the case was docketed here as an "Appeal from the Circuit Court of the United States for the Western District of Virginia." The form of the docket entry, however, does not change the character of the proceeding from which the appeal was taken, and that was clearly before the *Circuit Judge sitting as a Judge* and not as a court.

We submit that this appeal should be dismissed for the following reasons:

First.

Because no appeal lies to this Court from an order of a *Circuit Judge* of the United States sitting as a Judge, and not as a Court, discharging a prisoner brought before him on a writ of Habeas Corpus.

Carper v. Fitzgerald 121, U. S. 87, "when the writ of Habeas Corpus is issued by a Circuit Judge, and made *returnable before him*, not before the Circuit Court, there is no appeal from his decision." Curtis "Jurisdiction of United States Courts," bottom of p. 222.

2 Foster Federal Practice, page 751.

In re Palliser, 136 U. S. at page 262.
McKinney v. James, 155 U. S. at page 687.
Lambert v. Barrett, 157 U. S. at page 697.

Second.

Because the order of the Circuit Judge was not *final*, and hence not appealable." The prisoner was discharged "pending said injunction," and the prisoner is held subject to the further order of the United States Circuit Court. See p. 12.

That such order was not appealable, because not *final*.

Carper v. Fitzgerald, 121 U. S. at page 89.
Foster Federal Practice, § 368, at page 752.
McLish v. Roff, 141 U. S. at pages 661–2.

Third.

A.

Because this being an appeal under The Judiciary Act of March 3, 1891, Chap. 517, § 5, it can come here only on the "question of jurisdiction" of the Circuit Court of the United States. In such cases the Act provides that the question of jurisdiction *alone* shall be certified to this from the court below. There is no *certificate* of jurisdiction or certificate of any kind in this case. A certificate, from the court bolow, as to the distinct question of the jurisdiction involved, has been decided by this Court to be indispensable to the jurisdiction of this Court.

Maynard v. Hecht, 151 U. S. at page 324.
Colvin v. Jacksonville, 157 U. S. at page 368.
Van Wagenen v. Sewell, 160 U. S. at page 369.
Chappell v. United States, 160 U. S. at pages 499, 507.
Davis v. Giessler, 162 U. S. at page 291.

B.

The First and Second Assignments of Error, pp. 49, 50 do claim now that the Circuit Court of the United States had no jurisdiction over the matter involved, but

neither the Return p. 6, nor any pleading or paper in the case ever raised the question of the want of jurisdiction by the United States Circuit Court of the Habeas Corpus case, and, as already stated, there is no certificate of jurisdiction by said court below.

C.

The said First and Second Assignments of Error are too general; they do not indicate any specific question of jurisdiction; and they are not such sufficient statements of the question of jurisdiction as will supply the want of a formal certificate of jurisdiction required by § 5 of said Judiciary Act. It is true that this Court, in a few cases, has modified the rule to the extent that no certificate is necessary where the record itself presents the single matter of jurisdiction, but in those cases seeming to modify the rule, it is decided that the precise question of jurisdiction must be clearly, fully and separately stated in the record, that no mere general statement of want of jurisdiction, no mere suggestion that the jurisdiction of the Court was in issue, will suffice, nor will the Court itself search, nor follow counsel, to find the question of jurisdiction.

Chappell v. United States, 160 U. S. at page 499.

Van Wagenen v. Sewell, 160 U. S. at page 371.

D.

But an Assignment of Error cannot *import into a cause* questions of jurisdiction which the record does not show were distinctly and clearly raised in the Court below, and rulings asked thereon so as to give jurisdiction to this Court under Judiciary Act March 3, 1891, § 5.

Ansbro v. United States, 159 U. S. at page 697.

Cornell v. Green, 163 U. S. at page 89.

The Bayonne, 159 U. S. at page 687.

Fourth.

Because the other Assignments of Error 3, 4, and 5 seek, by this appeal in the Habeas Corpus Case, to attack *collaterally* the decrees and orders of the Federal Court of June 8th, 1894, found, p. 24, of January 31st, 1892, p. 29, and of August 6th, 1896, p. 45, rendered in certain separate and independent Equity causes in which injunctions were issued and sustained, enjoining the said creditors from the proceedings named in said County Court. There were no appeals in said Equity causes, and they are final until reversed on appeal. The Assignments 3, 4 and 5, attack these decrees and orders *collaterally*, and make them the ground of error relied on therein. The Federal Court had prior and exclusive jurisdiction of the subject-matter of said prosecution, of Wadley, and of the creditors prosecuting him, and even if these decrees and orders were erroneous they were not void, and such errors cannot be reached by this Appeal in another case, viz: the Habeas Corpus case. Just such an effort was made in the case of In re Lennon, 150, U. S. p. 393. See at p. 400, where the Court held that an appeal in Habeas Corpus *relates to the jurisdiction* of the court below in the Habeas Corpus case and to no other case.

The effort is now made, by this appeal from the order of discharge in the Habeas Corpus, to review the decrees and orders in the Equity (Injunction) case of H. G. Wadley v. Blount & Boynton, et al. It would be allowing this appeal to perform the function of an appeal in the injunction cases.

In re Lennon, 150 U. S. at p. 400. The same principle is also clearly laid down in Carey v. Houston &c. R. R., 150 U. S. at p. 171.

This is a direct appeal from the judgment of the Circuit Judge on the Habeas Corpus. No question as to the jurisdiction of the Circuit Judge, by whom this case was decided, has been certified to this court nor was such certificate ever asked for in that court; nor was any question of the jurisdiction of that court, in this case, raised or presented, in any way, by any form of pleading.

The questions of jurisdiction presented, by the 3, 4 and 5 Assignments of Error, relate not to the question of the jurisdiction of the Circuit Court in this (Habeas Corpus) case but relate to the jurisdiction of that court in the Equity suits of H. G. Wadley v. Blount & Boynton et al, in which writs of injunction were issued restraining the creditors from proceeding in County Court of Wythe County, Va., by said indictment. The fifth section of Judiciary Act of March 3, 1891, does not authorize a direct appeal to this Court in a suit upon a question involving the jurisdiction of the Circuit Court *over another suit previously determined* in the same court, and no question of jurisdiction over that other suit or over the decrees passed therein, can avail to sustain the direct appeal.

Carey v. Houston R. R., 150 U. S. 170, and In re Lennon Ibid are cases in point.

Fifth.

Because the record does not show that the "Appeal" allowed was ever "filed" in the United States Circuit Court. For even though in fact it had been delivered to and lodged with the clerk, this court is without jurisdiction.

The "*filing*" of the writ of Error or Appeal, in the court below, is essential to the transfer of the jurisdiction of the case from that court to this, and until that is done, this Court is without jurisdiction to entertain the case.

Brooks v. Norrls, 11 How. at page 207.
Mussina v. Cavazos, 6 Wall at page 355.
Mutual Life Co. v. Phinney, 76 Fed. at page 617.
Where cases are collated.

The petition for appeal and assignment of Errors were filed October 8th, and while allowance of appeal was October 12th, *it seems never "filed"* but merely lodged with the clerk. See page 49.

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